

Appendix VII of the Remediation General Permit: Endangered Species & Historic Properties Requirements

I. Endangered Species

A. Background

In order to meet its obligations under the Clean Water Act and the Endangered Species Act (ESA), and to promote the goals of those Acts, the Environmental Protection Agency (EPA) is seeking to ensure the activities regulated by this general permit do not adversely affect endangered and threatened species and critical habitat. All facilities seeking coverage must assess the impacts of their discharges and discharge-related activities on federally-listed endangered and threatened species (“listed species”) and designated critical habitat (“critical habitat”), to ensure that those goals are met. Prior to obtaining general permit coverage, facilities seeking coverage must meet the ESA eligibility provisions of this permit. Facilities seeking coverage should follow this appendix at the earliest possible stage to ensure that the notification requirements for general permit coverage are complete upon submission.

Facilities seeking coverage also have an independent ESA obligation to ensure that their activities do not result in any prohibited “takes” of listed species¹. Many of the measures required in this general permit and in these instructions to protect species may also assist in ensuring that the facilities seeking coverage activities do not result in a prohibited taking of species in violation of section 9 of the ESA. If the operator has plans or activities in areas where endangered and threatened species are located, they may wish to ensure that they are protected from potential takings liability under ESA section 9 by obtaining an ESA section 10 permit or by requesting formal consultation under ESA section 7. Facilities seeking coverage that are unsure whether to pursue a section 10 permit or a section 7 consultation for takings protection, should confer with the appropriate U.S. Fish and Wildlife Service (USFWS)² office or the National Marine Fisheries Service (NMFS), (collectively, “the Services”).

There are four listed species of concern to facilities seeking coverage applying for permit coverage, namely the **shortnose sturgeon**, the **dwarf wedge mussel**, the **bog turtle**, and the **northern redbelly cooter**. The shortnose sturgeon is listed under the jurisdiction of the National Marine Fisheries Service and the dwarf wedgemussel the **bog turtle**, and the **northern redbelly cooter** are listed under the jurisdiction of the U.S. Fish and Wildlife Service.

¹ Section 9 of the ESA prohibits any person from “taking” a listed species (e.g., harassing or harming it) unless: (1) the taking is authorized through a “incidental take statement” as part of completion of formal consultation according to ESA section 7; (2) where an incidental take permit is obtained under ESA section 10 (which requires the development of a habitat conservation plan); or (3) where otherwise authorized or exempted under the ESA. This prohibition applies to all entities including private individuals, businesses, and governments.

² Discharges to marine waters may require consultation with the National Marine Fisheries Service instead.

The federally-listed endangered dwarf wedgemussel (*Alasmodonta heterodon*) is found in the following areas in Massachusetts and New Hampshire:

1. Connecticut River from Northumberland to Dalton, New Hampshire (Coos County).
2. Connecticut River from Lebanon to North Walpole, New Hampshire (Grafton and Sullivan Counties).
3. Ashuelot River from the Surry Mountain Flood Control Project in Surry to Swanzey, New Hampshire (Cheshire County).
4. South Branch of the Ashuelot River in East Swanzey, New Hampshire (Cheshire County).
5. Mill River from Whately to Hatfield, Massachusetts (Hampshire County).
6. Fort River in Amherst, Massachusetts (Hampshire County).
7. Mill River south of State Route 10 in Northampton, Massachusetts (Hampshire County).

The federally-listed endangered shortnose sturgeon (*Acipenser brevirostrum*) is found in the following areas in Massachusetts:

8. Merrimack River from the Essex Dam in Lawrence, Massachusetts to the Merrimack River's mouth (Essex County).
9. Connecticut River from Turners Falls, Massachusetts (Franklin, Hampshire, and Hampden Counties) to the Connecticut River's mouth, Connecticut (Hartford, Middlesex, and New London Counties).

The federally-listed threatened **bog turtle** (*Clemmys muhlenbergii*), is found in the following areas in Massachusetts:

10. bodies of water in the Towns of Egremont and Sheffield (Berkshire County), MA.

The federally-listed endangered **northern redbelly cooter** (*Pseudemys rubriventris*) is found in the following areas in Massachusetts:

11. bodies of water occurring within the following boundaries: in the Towns of Plymouth and Carver, (Plymouth County) MA, west of Route 3 and north of Route 25; east of Route 58 and south of Route 44.

All facilities seeking coverage by this general permit, including owners and operators of facilities discharging into any of the eleven identified areas where the endangered dwarf wedgemussel, shortnose sturgeon, bog turtle, northern redbelly cooter are found, must determine whether they meet one or more of the ESA eligibility criteria (see section "C", below) before submitting an NOI. A facility that cannot meet any of the ESA eligibility criteria must apply for an individual permit.

B. The ESA Eligibility Criteria

A facility seeking coverage by this general permit must demonstrate that it meets one or more of the following criteria:

Criterion A: No endangered or threatened species or critical habitat are in proximity to the point where authorized discharges reach the receiving waters.

Criterion B: (1) In the course of a separate federal action involving the facility, formal or informal consultation with the Fish and Wildlife Service and/or the National Marine Fisheries Service under Section 7 of the ESA has been concluded and that consultation addressed the effects of the discharges and discharge-related activities on listed endangered or threatened species and critical habitat; and
(2) The consultation resulted in either a no jeopardy opinion or a written concurrence by USFWS and/or NMFS with a finding that the discharges and discharge-related activities are not likely to adversely affect listed endangered or threatened species or critical habitat.

Criterion C: The activities are authorized under Section 10 of the ESA and that authorization addresses the effects of the discharges and discharge-related activities on listed endangered or threatened species and critical habitat.

(Facilities must follow USFWS and/or NMFS procedures when applying for an ESA Section 10 permit (see 50 CFR §17.22(b)(1) for USFWS and §222.22 for NMFS). Application instructions for section 10 permits can be obtained by assessing the appropriate websites (www.fws.gov and www.nmfs.noaa.gov) or by contacting the appropriate regional office.)

Criterion D: Using the best scientific and commercial data available, the effects of the discharges and discharge related activities on listed species and critical habitat have been evaluated. Based on those evaluations, a determination is made by the applicant and affirmed after review by EPA that the discharges and discharge related activity are not likely to adversely affect any federally threatened or endangered listed species or designated critical habitat.

Criterion E: The discharges and discharge-related activities have already been addressed in another operator's certification of eligibility, which includes the facility's activities covered by the RGP.

C. The Steps To Determine if the ESA Eligibility Criteria Can Be Met

To determine eligibility, you must determine whether endangered or threatened species or critical habitat are in proximity to your facility or the points where its discharges reach the receiving waters PRIOR to completing and submitting a Notice of Intent (NOI). You must follow the steps outlined below and document the results of your eligibility determination.

Step 1. Determine if You Can Meet Eligibility Criterion “A”

Criterion A. You are eligible for coverage by this permit under Criterion A if you can answer “No” to all of the following questions:

- Are there any Endangered Species in your county? Are there any Critical Habitat Areas in your county?
- Are there any Endangered Species or Critical Habitat Areas in proximity to your facility or discharge locations?

Use Appendix II and the provisions below to answer these questions, and to: “*Check for Listed Endangered Species in Your County*,” “*Check for Critical Habitat in Your County*,” and “*Check for Proximity to Your Discharge Locations*.”

If you answered “No” to the questions above, you have met ESA eligibility Criterion A. Skip to Step 4.

If you answered “Yes” to either of the questions above, Go to Step 2.

Check for Listed Endangered Species in Your County. Look at the latest county species list to see if any listed species are found in your county. If you are located in proximity to the border of a county or your site or facility is located in one county and your discharge points are located in another, you must look under both counties. Since species are listed and de-listed periodically, you will need the most current list at the time you are conducting your endangered species assessment. See <http://cfpub.epa.gov/npdes/stormwater/esa.cfm>.

Check for Critical Habitat in Your County. Some (but not all) listed species have designated critical habitat. Exact locations of such habitat is provided in the endangered species regulations at 50 CFR part 17 and part 226. To determine if discharge locations are within designated critical habitat, you should either:

- Review the regulations (50 CFR Parts 17 and 226) that specify critical habitat. These regulations can be found in many larger libraries or via the Government Printing Office website, www.access.gpo.gov ; or

- Contact the nearest Fish and Wildlife Service (FWS) office. A list of FWS offices for the areas of permit coverage is found in section “E” of this Appendix; or

- Contact the Natural Heritage Program for your state. Heritage programs gather, manage, and distribute detailed information about the biological diversity found within their jurisdictions. They frequently have the most current information on listed species and critical habitat. Contact information for the Heritage program is provided in section “G” of this Appendix.

Check for Proximity to Your Discharge Locations. You must determine whether listed species or critical habitat are in proximity to your discharges. Listed species and critical habitat, including those in adjacent counties, are in proximity when they are:

- Located in the path or immediate area through which or over which contaminated water flows from the facility to the point of discharge into the receiving water. This includes areas in the receiving water downstream from the point of discharge.

- Located in the immediate vicinity of, or nearby, the point of discharge into receiving waters.

- Located in the area where BMPs or water treatment systems are planned or are to be constructed.

The area in proximity to be searched/surveyed for listed species will vary with the size and location of the site, the nature and quantity of the discharges, and the type of receiving waters. You should use the methods which allow you to determine, to the best of your knowledge, whether listed species, including those in adjacent counties, are in proximity to your particular site. These methods may include:

- Conducting visual inspections. This method may be particularly suitable for sites that are smaller in size or sites located in non-natural settings such as highly urbanized areas where there is little or no natural habitat. For other sites, a visual survey may not be sufficient to determine whether listed species are in proximity.

- Contacting the nearest State Wildlife Agency or U.S. FWS offices. Many endangered and threatened species are found in well-defined areas or habitats. That information is frequently known to state or federal wildlife agencies.

- Contacting local/regional conservation groups such as natural heritage programs (see section “G” below). These groups inventory species and their locations and maintain lists of sightings and habitats.

- Conducting a formal biological survey. Sites with extensive discharges may choose to conduct biological surveys as the most effective way to assess whether listed species are located in proximity and whether there are likely adverse effects.

Step 2. Determine If You Can Meet Eligibility Criteria “B”, “C”, or “E”

Criterion B. You are eligible for coverage by this permit under Criterion B if you can answer “Yes” to all of the following questions:

- Has consultation, under ESA Section 7, already been completed for discharges from your site³?
- Did the previously completed ESA Section 7 consultation consider all currently listed species and critical habitat and address your discharge and related activities?
- Has there been no substantial change, since that previous consultation, in:
 - (1) the nature and amount of your discharge and discharge-related activities,
 - (2) the characteristics of the receiving water, and
 - (3) the status of listed species and their critical habitat?
- Did the ESA Section 7 consultation result in either a “no jeopardy” opinion by the Service (for formal consultations) or a concurrence by the service that your activities would be “unlikely to adversely affect” listed species or critical habitat?
- Do you agree to implement all measures, if any, upon which the concurrence was conditioned?

If you answered “Yes” to all five questions above, you have met ESA eligibility Criterion B. Skip to Step 4.

If you answered “No” to any of the five questions above, check to see if you can meet Criteria C or E, or Go to Step 3.

Criterion C. You are eligible for coverage by this permit under Criterion C if you can answer “Yes” to all of the following questions:

- Has an ESA Section 10 permit already been issued for discharges from your

³ A formal or informal ESA Section 7 consultation on this or another federal action (e.g., new source review under NEPA, application for a dredge and fill permit under CWA Sec. 404, application for an individual NPDES permit, etc.) addressed the effects of your site or facility discharges and discharge-related activities on listed species and critical habitat. (See 50 CFR 402.13).

site⁴?

- Does your ESA Section 10 Permit consider all currently listed species and critical habitat, and address your discharges and related activities at your site?
- Has there been no substantial change, since that previous consultation, in:
 - (1) the nature and amount of your discharge and discharge-related activities,
 - (2) the characteristics of the receiving water, and
 - (3) the status of listed species and their critical habitat?

If you answered “Yes” to the three questions above, you have met ESA eligibility Criterion C. Skip to Step 4.

If you answered “No” to any of the three questions above, check to see if you can meet Criterion E, or Go to Step 3.

Criterion E. You are eligible for coverage by this permit under Criterion E if you can answer “Yes” to all of the following questions:

- Did another site or facility operator previously certify ESA eligibility for your site or facility⁵?
- Did the other operator's certification of eligibility consider all currently listed species and critical habitat and address your discharge and related activities?
- Has there been no substantial change, since that previous consultation, in:
 - (1) the nature and amount of your discharge and discharge-related activities,
 - (2) the characteristics of the receiving water, and
 - (3) the status of listed species and their critical habitat?
- Do you agree to implement all measures, if any, upon which the other operator's certification was based?

Before you rely on another operator's certification, you should carefully review that certification along with any supporting information. You also need to confirm that no additional species have been listed or critical habitat designated in the area of your site

⁴ You have a permit under section 10 of the ESA and that authorization addresses the effects of your discharges and related activities on listed species and critical habitat. You must follow FWS procedures when applying for an ESA section 10 permit (see 50 CFR 17.22(b)(1)).

⁵ In order to meet the permit eligibility requirements by relying on another operator's certification of eligibility, the other operator's certification must apply to the location of your site or facility and must address the effects from your discharges and related activities on listed species and critical habitat.

since the other operator's endangered species assessment was done. If you do not believe that the other operator's certification adequately assessed current circumstances, you may not rely on that prior certification as a basis for meeting these ESA review criteria.

If you answered “Yes” to all four questions above, you have met ESA eligibility Criterion E. Skip to Step 4.

If you answered “No” to any of the four questions above, Go to Step 3.

Step 3. Determine If You Can Meet Eligibility Criterion “D”

Criterion D. You can certify eligibility, according to Criterion D, for coverage by this permit if you can answer “Yes” to all of the following questions:

- Have you determined that your site's discharges and related activities are “not likely to adversely affect” listed species or critical habitat, and/or have you reached agreement with the appropriate Service on measures to avoid, eliminate, or minimize adverse effects?
- Do you agree to implement all measures upon which the determination was conditioned?

If you answered “Yes” to the both questions above, you have met ESA eligibility Criterion D. Go to Step 4.

If you answered “No” to either of the questions above you are not eligible for coverage by this permit. You must submit an individual application for your discharges to EPA. (See 40 CFR 122.21)

Step 4. Submit Notice of Intent and Document Results of the Eligibility Determination.

Once you have demonstrated that you meet one or more of the ESA eligibility criteria and have determined NHPA eligibility (see Section II of this Appendix), you may submit the Notice of Intent (NOI). Signature and submittal of the NOI constitutes your certification, under penalty of law, of your eligibility for permit coverage.

You must include documentation of ESA eligibility with the NOI. Documentation required for the various ESA eligibility criteria are as follows:

Criterion A: A copy of the most current county species list pages for the county(ies) where your site or facility and discharges are located. You must also include a statement on how you determined that no listed species or critical habitat are in proximity to your site or facility or discharge locations.

Criterion B: A copy of the USFWS's and/or NMFS's, as appropriate, biological opinion or concurrence on a finding of "unlikely to adversely effect" regarding the ESA Section 7 consultation.

Criterion C: A copy of the USFWS's and/or the NMFS's, as appropriate, letter transmitting the ESA Section 10 authorization.

Criterion D: Documentation of how you determined adverse effects on listed endangered or threatened species and critical habitat were unlikely.

Criterion E: A copy of the documents originally used by the other operator of your site or facility (or area including your site) to satisfy the documentation requirement of Criteria A, B, C or D.

D. Duty To Implement Terms and Conditions Upon Which Eligibility Was Determined

You must comply with any terms and conditions imposed under the ESA eligibility requirements to ensure that your discharges and discharge-related activities do not pose adverse effects or jeopardy to listed species and/or critical habitat. You must incorporate such terms and conditions into your BMPP as required by the permit. If the ESA eligibility requirements of the permit cannot be met, then you may not be covered under this permit (RGP), and must apply for an individual permit.

E. U.S. Fish and Wildlife Service Offices

National Websites For Endangered Species Information:

Endangered Species Home Page: <http://endangered.fws.gov/>

ESA Section 7 Consultations: <http://endangered.fws.gov/consultations/index.html>

U.S. FWS Region 5

Supervisor

New England Field Office

US Fish and Wildlife Service

70 Commercial St., Suite 300

Concord, NH 03301

F. National Marine Fisheries Services

Website: http://www.nmfs.noaa.gov/pr/species/esa_species.htm

Northeast Regional Office

National Marine Fisheries Service
Northeast Region, Protected Resource Division
Attn: Endangered Species Coordinator
One Blackburn Drive
Gloucester, MA 01930

G. Natural Heritage Network

The Natural Heritage Network comprises 75 independent heritage program organizations located in all 50 states, 10 Canadian provinces, and 12 countries and territories located throughout Latin America and the Caribbean. These programs gather, manage, and distribute detailed information about the biological diversity found within their jurisdictions. Developers, businesses, and public agencies use natural heritage information to comply with environmental laws and to improve the environmental sensitivity of economic development projects. Local governments use the information to aid in land use planning.

The Natural Heritage Network is overseen by NatureServe, the Network's parent organization, and is accessible on-line at: http://www.natureserve.org/nhp/us_programs.htm, which provides website and other access to a large number of specific biodiversity centers.

Massachusetts Natural Heritage & Endangered Species Program
Division of Fisheries and Wildlife
Route 135
Westborough, MA 01581
508/792-7270

New Hampshire Natural Heritage Bureau
Department of Resources & Economic Development
172 Pembroke Street, P.O. Box 1856
Concord, NH 03302-1856
603/271-3623

II. Historic Properties

A. Background

Facilities seeking coverage must comply with applicable State, Tribal and local laws concerning the protection of historic properties and places and facilities seeking coverage are required to coordinate with the State Historic Preservation Officer and/or Tribal Historic Preservation Officer and others regarding effects of their discharges on historic properties. Facilities which adversely affect properties listed or eligible for listing in the National Registry of Historic Places under the National Historic Preservation Act of 1966, 16 USC Sections 470 et seq. are **not** authorized to discharge under this permit.

B. Determination of Potential Impact

Facilities seeking coverage must determine whether their site's discharges or implementation of best management practices (BMPs) to control such discharges, has potential to affect a property that is either listed or eligible for listing on the National Register of Historic Places.

For existing dischargers whose water treatment systems and BMPs do not require construction activities (e.g., the treatment system is contained in a trailer), a simple visual inspection may be sufficient to determine whether historic properties are affected. However, for sites which are new dischargers and for existing sites which are planning construction activities related to treatment systems or BMPs, facilities seeking coverage should conduct further inquiry to determine whether historic properties may be affected by the discharge or BMPs to control the discharge. In such instances, facilities seeking coverage should first determine whether there are any historic properties or places listed on the National Register or if any are eligible for listing on the register (e.g., they are “eligible for listing”).

EPA suggests that facilities seeking coverage first access the “National Register of Historic Places” information listed on the National Park Service's web page: <http://www.cr.nps.gov/nr>. The addresses for State Historic Preservation Officers are listed in Section II of this appendix. Facilities seeking coverage may also contact city, county or other local historical societies for assistance, especially when determining if a place or property is eligible for listing on the register.

C. Permit Eligibility Criteria

The following three scenarios describe how facilities seeking coverage can meet the permit eligibility criteria for protection of historic properties under this permit:

- (1) If historic properties are not identified in the path of a site's discharges or where construction activities are planned to implement BMPs to control such discharges (e.g., diversion channels or retention ponds), then the applicant is eligible for coverage under

this permit.

(2) If historic properties are identified but it is determined that they will not be affected by the discharges or construction of BMPs to control the discharge, the applicant has met the NHPA eligibility criteria for coverage under this permit.

(3) If historic properties are identified in the path of discharges or where construction activities are planned to implement BMPs to control such discharges, and it is determined that there is the potential to adversely affect the property, the applicant can still meet the NHPA eligibility criteria under of this permit, if he/she obtains and complies with a written agreement with the appropriate State or Tribal Historic Preservation Officer which outlines measures the applicant will follow to mitigate or prevent those adverse effects. The contents of such a written agreement must be included in the BMPP.

In situations where an agreement cannot be reached between an applicant and the State Historic Preservation Officer, facilities seeking coverage should contact the Advisory Council on Historic Preservation listed in Section II.E. below for assistance.

The term "adverse effects" includes but is not limited to damage, deterioration, alteration or destruction of the historic property or place. EPA encourages facilities seeking coverage to contact the appropriate State or Tribal Historic Preservation Officer as soon as possible in the event of a potential adverse effect to a historic property.

Facilities seeking coverage are reminded that they must comply with applicable State, Tribal and local laws concerning the protection of historic properties and places.

D. Internet Information on the National Register of Historic Places

The National Register of Historic Places is the Nation's official list of cultural resources worthy of preservation. Authorized under the National Historic Preservation Act of 1966, the National Register is part of a national program to coordinate and support public and private efforts to identify, evaluate, and protect our historic and archeological resources. Properties listed in the Register include districts, sites, buildings, structures, and objects that are significant in American history, architecture, archeology, engineering, and culture. The National Register is administered by the National Park Service, which is part of the U.S. Department of the Interior.

An electronic listing of the "National Register of Historic Places," as maintained by the National Park Service, can be accessed on the Internet at: <http://www.cr.nps.gov/nr>.

E. State Historic Preservation Officers (SHPO)

Massachusetts Historical Commission
220 Morrissey Boulevard
Boston, MA 02125

617/727-8470
TTD: 1-800-392-6090

New Hampshire Division of Historic Resources
P.O. Box 2043
Concord, NH 03302-2043
603/271-6435
TDD: 1-800-735-2964

III. Advisory Council on Historic Preservation

The Advisory Council on Historic Preservation (ACHP) is an independent federal agency that promotes the preservation, enhancement, and productive use of our Nation's historic resources, and advises the President and Congress on national historic preservation policy.

The goal of the National Historic Preservation Act (NHPA), which established ACHP in 1966, is to have federal agencies act as responsible stewards of our Nation's resources when their actions affect historic properties. ACHP is the only entity with the legal responsibility to encourage federal agencies to factor historic preservation into federal project requirements.

As directed by NHPA, ACHP serves as the primary federal policy advisor to the President and Congress; recommends administrative and legislative improvements for protecting our Nation's heritage; advocates full consideration of historic values in federal decision making; and reviews federal programs and policies to promote effectiveness, coordination, and consistency with national preservation policies.

Main Office

Advisory Council on Historic Preservation
Old Post Office Building
1100 Pennsylvania Avenue, NW, Suite 809
Washington, DC 20004
Phone: (202) 606-8503
Fax: (202) 606-8647/8672
E-mail: achp@achp.gov
Internet: <http://www.achp.gov/>